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and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

General Notice

19 CFR Part 133

APPLICATION FOR RECORDATION OF TRADE NAME: "TUNE BELT"

ACTION: Notice of application for recordation of trade name.

SUMMARY: Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.13), for the recordation under Section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "TUNE BELT," used by Tune Belt, Inc., a corporation organized under the laws of the State of Ohio, located at 2601 Arbor Place, Cincinnati, Ohio 45209.

The application states that the trade name is used in connection with clothing, manufactured by Kama Corporation, LTD. in Taipei, Taiwan.

Before final action is taken on the application, consideration will be given to any relevant data, views or arguments submitted in writing by any person in opposition to the recordation of this trade name. Notice of the action taken on the application for recordation of this trade name will be published in the Federal Register.

DATE: Comments must be received on or before December 19, 1988.

ADDRESS: Written comments should be addressed to the Commissioner of Customs, Attention: Value, Special Programs and Admissibility Branch, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (Room 2104).

FOR FURTHER INFORMATION CONTACT: Bettio Coombs, Value, Special Programs and Admissibility Branch, 1301 Constitution Avenue, NW., Washington, D.C. 20229 ((202) 566–5765). Dated: October 13, 1988.

MARVIN M. AMERNICK,
Chief,
Value, Special Programs and Admissibility Branch.

[Published in the Federal Register, October 19, 1988 (53 FR 41012)]

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 87–1436)

UNITED STATES, PLAINTIFF/APPELLANT *v.* JOSEPH BLUM AND E.C. MCAFEE & CO., DEFENDANTS/APPELLEES

ST. PAUL FIRE AND MARINE INS. CO., DEFENDANT/THIRD-PARTY-PLAINTIFF/APPELLEE *v.* INTERNATIONAL CITRUS OF CANADA, INC., AND INTERNATIONAL CITRUS OF CANADA, LTD., THIRD-PARTY DEFENDANTS

A. David Lafer, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for plaintiff/appellant. With him on the brief were *Richard K. Willard,* Assistant Attorney General, *David M. Cohen,* Director and *Jeanne E. Davidson.* Also on the brief was *Martin J. Ward,* U.S. Customs Service, of counsel.

James Caffentzis, Fitch, King & Caffentzis, of New York, New York, argued for defendants/appellees.

Leonard L. Rosenberg, Sandler & Travis, P.A., of Miami, Florida, argued for defendant/third-party-plaintiff/appellee.

Appealed from: U.S. Court of International Trade.
Judge ACQUILINO.

(Decided September 30, 1988)

Before FRIEDMAN, SMITH, and MAYER, *Circuit Judges.*

SMITH, *Circuit Judge:*

In this international trade case, the United States appeals from the judgment of the United States Court of International Trade in *United States* v. *Blum,*[1] by which that court dismissed the action for import duties, pursuant to 19 U.S.C. § 1592(d) (1982), brought by the United States against appellees, E.C. McAfee & Company (McAfee) and against St. Paul Fire and Marine Insurance Company (St. Paul). We reverse.

[1] *United States* v. *Blum,* 660 F. Supp. 975 (Ct. Int'l Trade 1987).

ISSUE

The principal question before this court is whether the Court of International Trade erred, as a matter of law, by holding that the United States, pursuant to 19 U.S.C. § 1592, could not recover under subsection (d) import duties from a party that did not violate the provisions of subsection (a).

BACKGROUND

On May 6, 1985, the United States brought an action pursuant to 19 U.S.C. § 1592 in the Court of International Trade against Joseph Blum (Blum), president and controlling officer of International Citrus of Canada, Incorporated, against McAfee, and against St. Paul. That action was brought to enforce both a claim against Blum for civil penalties, and a claim against Blum, McAfee, and St. Paul for lost import duties resulting from alleged conduct by Blum that violated section 1592. The United States' complaint stated that Blum improperly caused orange juice concentrate to be entered into the United States duty-free under item 800.00 of the Tariff Schedules of the United States, whereas the orange juice concentrate was not entitled to duty-free entry. The complaint alleges that, as a result of Blum's improper conduct, the United States incurred an actual loss of import duties amounting to $253,612.60.

On the basis of these factual allegations, counts I, II, and III of the United States' complaint respectively alleged, pursuant to subsection (a), fraud, gross negligence, and negligence on the part of Blum. The United States sought to impose penalties and to recover lost import duties against Blum under subsections (a), (c), and (d). In addition, the United States sought to recover lost import duties under subsection (d) against McAfee, the importer of record, and against St. Paul, the surety for McAfee. The complaint does not accuse either McAfee or St. Paul of any wrongdoing under subsection (a).

Before the Court of International Trade, both McAfee and St. Paul filed motions to dismiss and for judgment on the pleadings, respectively, taking the position that the United States cannot recover, pursuant to subsection (d), import duties from a party that has not violated subsection (a). The Court of International Trade did dismiss the action against both McAfee and St. Paul, holding that, as a matter of law, subsection (d) does not provide an independent judicial cause of action to recover lost import duties resulting from a violation of subsection (a). As an alternative basis for dismissal, the Court of International Trade held that subsection (d) does not permit the United States to recover lost import duties from parties that have not violated subsection (a). For the reasons set forth below, we hold that the Court of International Trade erred by dismissing the action by the United States against both McAfee and St. Paul.

ANALYSIS

Structure and History of Section 1592.

Section 1592 is comprised of five subsections and applies in the event a party either attempts to enter or enters any merchandise into commerce of the United States, and deprives the United States of any lawful duty thereon, by fraud, gross negligence, or negligence. Subsection (a) provides both the general rule of prohibition and an exception to that rule.

> **(a) Prohibition**
>
> **(1) General rule**
> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence—
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—
>
> (i) any document, written or oral statement, or act which is material and false, or
> (ii) any omission which is material, or
>
> (B) may aid or abet any other person to violate subparagraph (A).
>
> **(2) Exception**
> Clerical errors or mistakes of fact are not violations of paragraph (1) unless they are part of a pattern of negligent conduct.

Subsection (b) provides the procedures that the United States must follow in pursuing a claim for a monetary penalty resulting from a violation of subsection (a). Subsection (c) provides the maximum penalties that may be imposed for a violation of subsection (a). Subsection (d) provides the United States with a remedy to recover import duties lost as a result of a violation of subsection (a).

> **(d) Deprivation of lawful duties**
>
> Notwithstanding section 1514 of this title, if the United States has been deprived of lawful duties as a result of a violation of subsection (a) of this section, the appropriate customs officer shall require that such lawful duties be restored, whether or not a monetary penalty is assessed.

Finally, subsection (e) provides guidelines for the burdens of proof and standards of review of the issues in an action brought before the Court of International Trade pursuant to the provisions of section 1592 concerning penalties.

The Court of International Trade analyzed both the plain language and the legislative history of section 1592 in reaching its conclusion to dismiss the action against McAfee and St. Paul and

rested its decision on the two alternative grounds set forth above. We disagree with both conclusions.

A. *Subsection (d) Does Provide an Independent Judicial Cause of Action.*

The Court of International Trade held that subsection (d) is not judicially enforceable and that subsection (d) does not provide the United States with an independent cause of action to collect lost import duties resulting from conduct that violated subsection (a). Rather, the Court of International Trade concluded that subsection (d) merely provides the United States with authority only to collect lost import duties using the administrative process. We disagree.

The plain language of subsection (d) provides for recovery of lost import duties resulting from a violation of subsection (a). Under this provision, import duties lost as a result of a violation of subsection (a) are recoverable by the United States "whether or not a monetary penalty [pursuant to subsection (a)] is assessed."[2] We hold that such a claim is judicially enforceable pursuant to subsection (d).[3]

The Court of International Trade interprets this statutory provision merely as providing authority for Customs to continue to require the payment of lost duties as a condition of mitigation. Such a limited reading of section 1592 renders subsection (d) nearly meaningless. Under that court's scenario, the United States, via Customs, has the power to order the collection of import duties lost as a result of a violation of subsection (a) but the United States is powerless to judicially enforce such a claim. The statutory language and legislative history of subsection (d) do not provide, and we cannot conceive, any reason for limiting solely to the administrative level the ability of the United States to recover such duties.

B. *Subsection (d) Is A Nonpenalty Provision.*

As an alternative basis for dismissal, the Court of International Trade held that subsection (d) does not permit recovery of import duties from "innocent parties," i.e., parties that have not violated subsection (a). That court concluded that restoration of import duties pursuant to subsection (d) is directly contingent upon wrongdoing. We disagree.

The provisions of section 1592 apply in the event a party commits fraud, gross negligence, or negligence in the introduction of merchandise into the United States. The statutory scheme provides the United States with means both (1) to impose a penalty for the improper conduct *and* (2) to recover import duties lost as a result of the improper conduct. Subsection (d) is not a penalty provision; rather, subsection (d) allows the United States to recover lawful duties lost as a result of a violation of subsection (a). Lawful duties are

[2] 19 U.S.C. § 1592(d).

[3] The Court of International Trade, pursuant to subsection (d), repeatedly has accepted subject matter jurisdiction over claims by the United States seeking reimbursement for lost import duties. *See, e.g., United States* v. *Quinton*, 7 CIT 153 (1984); *United States* v. *Ross*, 574 F. Supp. 1067, 1068–69 (Ct. Int'l Trade 1983).

those that would have been collected by the United States but-for the violation of subsection (a). We interpret the authority of the United States to seek lost import duties under subsection (d) as not limited to those parties that have violated subsection (a) but as extending to those parties who may have been deemed responsible for the lawful duties had such duties lawfully been imposed.

McAfee and St. Paul argue that the plain language of section 1592 provides that duties referred to in subsection (d) may be demanded by the United States only from a party violating subsection (a). Appellees argue that the type of reasoning supporting a conclusion that the United States may recover lawful duties from an innocent party pursuant to subsection (d) would also support a conclusion that the United States may assess the penalties provided for under subsection (c) against innocent parties. We are not persuaded.

First, section 1592 is entitled "Penalties for fraud, gross negligence, and negligence"; however, that is not to say that each and every subsection of that section is to be characterized as a penalty provision.[4] As previously recognized, section 1592 contains both penalty and nonpenalty provisions. For example, subsection (c) is a penalty provision and, as such, may be applied only against a wrongdoer. In contrast, however, subsection (d) is a nonpenalty provision. Because of its nonpenalty nature, the United States' application of subsection (d) is not limited to those parties that are wrongdoers.

Second, parties that have not violated subsection (a) but traditionally may be liable to the United States for import duties are not "innocent parties" under section 1592. Although such parties may be "innocent" of a subsection (a) violation, these parties, if determined to be liable for import duties, are not "innocent" with respect to subsection (d). Subsection (d) allows the United States to recover duties that would have been paid but-for conduct that violates subsection (a). It follows that subsection (d) provides the United States with a cause of action to recover duties from those parties traditionally liable for such duties, *e.g.*, the importer of record and its surety.

McAfee and St. Paul further argue that the legislative history behind section 1592 reflects the absence of congressional intent to hold sureties and other third parties responsible for duties sought under subsection (d). As support for this argument, they cite legislative history providing that the persons covered and the nature of the offenses set forth in section 1592 are intended to remain the same as they were under the predecessor statutes. We are not persuaded.

Although Congress, in enacting the current version of section 1592, may not have intended to expand from prior law the scope of persons liable for *penalties*, such intent is not relevant with respect to the nonpenalty provisions of section 1592. After a careful review of the limited legislative history, and in view of the arguments and

[4] *See generally Railroad Trainmen* v. *Baltimore & O.R.R.*, 331 U.S. 519, 528–29 (1947) (recognizing that headings and titles of statutes are nothing more than a reference guide and cannot limit the plain meaning of the statutory language).

record on appeal, we cannot hold, and there is no indication that Congress intended, that persons traditionally liable for duty payments be exempt under section 1592 from their statutory or contractual obligations.

CONCLUSION

In view of the foregoing, we hold that the Court of International Trade erred by dismissing the action pursuant to section 1592(d) against McAfee and St. Paul. Accordingly, we reverse the Court of International Trade's judgment and remand this proceeding to that court for further action in accordance with this decision.

REVERSED AND REMANDED

(Appeal No. 88–1076, 88–1107)

WASHINGTON RED RASPBERRY COMMISSION, RED RASPBERRY COMMITTEE OF THE OREGON CANEBERRY COMMISSION, RED RASPBERRY COMMITTEE OF THE NORTHWEST FOOD PROCESSORS ASSOCIATION, RED RASPBERRY MEMBER GROUP OF THE AMERICAN FROZEN FOOD INSTITUTE, RADAR FARMS, RON ROBERTS, SHUKSAN FROZEN FOODS, INC., WASHINGTON RED RASPBERRY GROWERS ASSOCIATION, AND NORTH WILLAMETTE HORTICULTURAL SOCIETY, PLAINTIFFS/APPELLANTS *v.* UNITED STATES, U.S. DEPARTMENT OF COMMERCE, AND THE HONORABLE MALCOLM BALDRIDGE, SECRETARY, U.S. DEPARTMENT OF COMMERCE, DEFENDANTS/CROSS-APPELLANTS, AND ABBOTSFORD GROWERS CO-OPERATIVE UNION AND CHILLIWACK FRUIT GROWERS CO-OPERATIVE, DEFENDANTS

Michael D. Reynolds, Assistant Solicitor General, State of Oregon, argued for plaintiffs/appellants. With him on the brief were *Dave Frohnmayer,* Attorney General and *Virginia Linder,* Solicitor General. Also on the brief were *Ken Eikenberry,* Attorney General, *Maureen Hart,* Assistant Attorney General, State of Washington, *Joseph W. Dorn* and *Walter E. Spiegel,* Kilpatrick and Cody, of Washington, D.C.

M. Martha Ries, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendants/cross-appellants. With her on the brief were *John R. Bolton,* Assistant Attorney General, *David M. Cohen,* Director and *Velta A. Melnbrencis,* Assistant Director. Also on the brief was *Lisa B. Koteen,* Acting Senior Counsel for International Trade, Office of the Deputy Chief, Counsel for Import Administration, U.S. Department of Commerce, of counsel. *William K. Ince* and *Gregory J. Bendlin,* Cameron, Hornbostel & Butterman, of Washington, D.C., were on the brief for defendants.

Appealed from: U.S. Court of International Trade.

Judge AQUILINO, JR.

(Decided October 13, 1988)

Before SMITH, *Circuit Judge*, SKELTON, *Senior Circuit Judge*, and NEWMAN, *Circuit Judge*.

SMITH, *Circuit Judge*.

In this antidumping case, appellants, Washington Red Raspberry Commission and other domestic raspberry growers[1] (collectively WRRC), appeal the decision and order of the United States Court of International Trade, dated September 8, 1987, sustaining an antidumping determination by the United States International Trade Administration (ITA) on certain red raspberries imported from Canada.[2] The United States (Government) cross-appeals. We affirm.[3]

ISSUES

On appeal, we address the following issues:

1. Whether the Court of International Trade erred by sustaining the ITA's final determination excluding Abbotsford from its antidumping duty order on the basis of the ITA's finding that Abbotsford's dumping margin was *de minimis*;
2. Whether the ITA, in converting the foreign currency for purposes of making price comparisons in the investigation, erred by using the exchange rates in effect at the time of United States sales of red raspberries; and
3. Whether the Court of International Trade erred by determining that the pails and drums in which the raspberries are packed formed an integral part of the merchandise, and that the cost of these items be included as a cost of materials within the constructed value definition.

BACKGROUND

On July 3, 1984, WRRC filed an antidumping petition with the ITA alleging sales at less than fair value of fresh and frozen red raspberries imported into the United States from Canada. On July 23, 1984, the ITA initiated its antidumping investigations and, on December 18, 1984, preliminarily determined that red raspberries from Canada were being, or were likely to be, sold in the United States at less than fair value.[4]

On May 10. 1985, the ITA published its final determination, assessing antidumping duties on certain red raspberries imported from Canada by East Chilliwack Fruit Growers Co-Operative

[1] The other domestic raspberry growers involved in this action are Red Raspberry Committee of the Oregon Caneberry Commission, Red Raspberry Committee of the Northwest Food Processors Association, Red Raspberry Member Group of the American Frozen Food Institute, Radar Farms, Ron Roberts, Shuksan Frozen Foods, Inc., Washington Red Raspberry Growers Association, and North Willamette Horticultural Society.

[2] *Washington Red Raspberry Comm'n* v. *United States*, 670 F. Supp. 1004 (Ct. Int'l Trade 1987) (*WRRC III*). Antidumping duties were assessed against three of the four investigated Canadian processors/packers of red raspberries, namely East Chilliwack Fruit Growers Coop., Jesse Processing Ltd., and Mukhtiar and Sons Packers Ltd.

[3] WRRC appeals the Court of International Trade's September 8, 1987, decision and order affirming the ITA's determination, which determination excluded Abbotsford from the ITA's antidumping duty order because the dumping margin for Abbotsford was *de minimis*. The Government cross-appeals that part of the Court of International Trade's March 17, 1987, order, which order remanded the matter to the ITA with instructions to recalculate the dumping margins. In the March 17, 1987, order, the Court of International Trade determined that the ITA erroneously calculated the constructed values by failing to include the cost of pails and drums within the cost of the merchandise.

[4] Red Raspberries from Canada: Preliminary Determination of Sales at Less Than Fair Value, 49 Fed. Reg. 49,129 (1984).

(ECFG), Jesse Processing Ltd. (Jesse), and Mukhtiar and Sons Packers Ltd. (Mukhtiar).[5] In its final determination, the ITA used the "constructed value" method to compute foreign market value for two of the Canadian red raspberry exporters, namely ECFG and Jesse, because substantially all of their home market sales were below the cost of producing the raspberries. For the other two Canadian red raspberry exporters, Mukhtiar and Abbotsford, the foreign market value was based on home market sales. Abbotsford was excluded from the antidumping duty order because Abbotsford's weighted-average dumping margin of 0.19 percent was considered *de minimis.*

WRRC filed an action in the Court of International Trade, challenging the exclusion of Abbotsford from the final determination and alleging eight methodological errors by the ITA which resulted in lower dumping margins. The Court of International Trade, agreeing with WRRC's allegations, remanded the proceeding to the ITA (first remand) with instructions to recalculate the dumping margins.[6] On the first remand, the ITA calculated a weighted-average dumping margin for Abbotsford of 0.78 percent and, on that basis, concluded that Abbotsford should be included in the antidumping duty order.

Again before the Court of International Trade, Abbotsford objected to the ITA's determination on the first remand, alleging four clerical errors in the calculation of the dumping margins. The Court of International Trade was persuaded by Abbotsford's arguments and again remanded the matter to the ITA (second remand) with instructions to recalculate the dumping margins.[7] After correcting the four errors, the ITA found a 0.42 percent weighted-average dumping margin for Abbotsford, determined this amount *de minimis,* and excluded Abbotsford from the antidumping duty order. On September 8, 1987, the Court of International Trade sustained the ITA's determinations on the second remand and held that the ITA's determination to exclude Abbotsford from the antidumping duty order was supported by substantial evidence on the record and was otherwise in accordance with the law.[8]

ANALYSIS

A. Statutory Framework

Under the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979,[9] if foreign merchandise is sold or is likely to be sold in the United States at less than its fair value to the material

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[5] Red Raspberries from Canada: Final Determination of Sales at Less Than Fair Value, 50 Fed. Reg. 19,768 (1985).

[6] *Washington Red Raspberry Comm'n* v. *United States,* 657 F. Supp. 537 (Ct. Int'l Trade 1987) (*WRRC I*). On appeal to this court, the Government argues that the Court of International Trade erred in *WRRC I* by determining that the pails and drums in which the raspberries were packed formed an integral part of the merchandise, and should have been included as a cost of materials within the constructed value definition. The Government contends that the cost of the pails and drums should have been treated as a packing cost.

[7] *Washington Red Raspberry Comm'n* v. *United States,* Court No. 85-06-00789 (Ct. Int'l Trade June 26, 1987) (*WRRC II*).

[8] *WRRC III,* 670 F. Supp. at 1004.

[9] 19 U.S.C. §§ 1673 *et seq.* (1982).

injury of a United States industry, then an antidumping duty shall be imposed, "in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise."[10] The statute provides for several different methods of computation of both the foreign market value and the United States price. Both figures are subject to cost adjustments in an attempt to derive values at a common point in the chain of commerce, so that the values reasonably can be compared on an equivalent basis.[11]

The United States price is defined by statute as either the purchase price or the exporter's sales price, whichever is appropriate.[12] Purchase price, used where the importer is not related to the foreign producer, is "the actual or agreed-to price between the foreign producer and the independent importer, prior to the time of importation."[13] Exporter's sales price, used where the importer is a related party, is "the price at which the goods are eventually transferred in an arm's length transaction, whether from the importer to an independent retailer or directly to the public."[14]

Generally, foreign market value is computed by one of the following three methods:[15] (1) home market sales, (2) third country sales, or (3) constructed value.[16] Although the home-market-sales method is preferred, the statute provides that either third country sales or constructed value may be used where there are no such home market sales.[17] The constructed value is the sum of (1) the cost of materials and fabrication, (2) an amount for general expenses and profit, and (3) the cost of all containers, coverings, and other expenses incidental to placing the merchandise in condition, packed, and ready for shipment to the United States.[18]

The foreign market value and the United States price, once computed and adjusted by Commerce, are then compared. If the foreign market value exceeds the United States price for the merchandise, then an antidumping duty is imposed in the amount of the difference between the two values.[19]

B. The Issues

1. The De Minimis Rule.

In the proceedings below, the ITA determined that the United States prices of fresh and frozen red raspberries from Canada, produced by Abbotsford, were less than the foreign market values of such or similar red raspberries. Abbotsford's weighted-average dumping margin finally was calculated by the ITA to be 0.42 percent. However, according to the ITA, because a dumping margin of

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[10] *Id.* § 1673.
[11] *Smith-Corona Group* v. *United States*, 713 F.2d 1568, 1571–72 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).
[12] 19 U.S.C. § 1677a(a).
[13] *Smith-Corona Group*, 713 F.2d at 1572.
[14] *Id.*
[15] 19 U.S.C. § 1677b.
[16] *Smith-Corona Group*, 713 F.2d at 1572–73.
[17] 19 U.S.C. § 1677b(a)(2).
[18] 19 U.S.C. § 1677b(e)(1).
[19] 19 U.S.C. § 1673.

0.42 percent is *de minimis,* Abbotsford was excluded from the antidumping duty order. The Court of International Trade sustained the ITA's application of the *de minimis* rule, concluding that the ITA's determination was supported by substantial evidence on the record and otherwise was in accordance with the law.[20]

The appropriate standard of review of a final antidumping determination is limited to whether that determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law."[21] It is in view of this standard, that we review the determination before us.

WRRC argues that the ITA lacks statutory authority to ignore small dumping margins through its application of the *de minimis* rule. As support for its argument, WRRC contends that Congress has not expressly authorized the ITA to ignore *de minimis* or negligible dumping margins. We are not persuaded.

The *de minimis* concept[22] is well-established in federal law.[23] Federal courts and administrative agencies repeatedly have applied the *de minimis* principle in interpreting statutes, even when Congress failed explicitly to provide for the rule.[24] The ITA has long ignored *de minimis* dumping margins.[25] WRRC has given us no reason to disturb this practice.

Although we are not bound by the case law precedent of the Court of International Trade, we are in complete agreement with, and adopt as our own, the holding in *Carlisle Tire and Rubber Co.* v. *United States*[26] that the ITA may find that dumping margins less than 0.50 percent are *de minimis,* but only if the ITA explains the basis for its decision.[27] Accordingly, we must affirm the Court of International Trade's decision sustaining the ITA's application of the *de minimis* rule if we determine both that the record contains substantial evidence supporting the ITA's calculation of the dumping

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[20] *WRRC III,* 670 F. Supp. 1004.

[21] 19 U.S.C. § 1516a(b)(1)(B); *see Matsushita Elec. Indus. Co.* v. *United States,* 750 F.2d 927, 936 (Fed. Cir. 1984).

[22] The Latin maxim *de minimis not curat lex* is the doctrine that "[t]he law does not care for, or take notice of, very small or trifling matters." BLACK's LAW DICTIONARY 388 (5th ed. 1979).

[23] For example, § 132 of the Internal Revenue Code of 1986 permits the administering authority to exclude from gross income any employee fringe benefits that are found to be *de minimis.* 26 U.S.C. § 132(a) (1988). Further, § 132 defines *de minimis* benefits as those that are so small as to make accounting for them unreasonable or administratively impracticable. 26 U.S.C. § 132 (e)(1).

[24] *See, e.g., Anderson* v. *Mt. Clemens Pottery Co.,* 328 U.S. 680, 692–93 (1946) (allowing application of the *de minimis* rule to the Fair Labor Standards Act for insubstantial and insignificant periods of time); *NLRB* v. *Fainblatt,* 306 U.S. 601, 606–07 (1939) (indicating the NLRB could apply the *de minimis* maxim in accordance with congressional intent even where the language of the National Labor Relations Act is absolute); *Monsanto Co.* v. *Kennedy,* 613 F.2d 947, 955–56 (D.C. Cir. 1979) (agency has the authority, deriving from administrative discretion inherent in the statutory scheme, to deal with *de minimis* situations and exempt food additives from regulation despite the strictly literal terms of the statutory definition); *ASG Indus., Inc.* v. *United States,* 610 F.2d 770, 776 (CCPA 1979) (indicating that the *de minimis* concept was applicable in determining whether a bounty or grant was paid upon the manufacture or production of merchandise, so as to require the imposition of a countervailing duty); *Varsity Watch Co.* v. *United States,* 34 CCPA 155, 161–63 (1947) (discussing and acknowledging the validity of the *de minimis* rule in tariff classification cases but finding more than a *de minimis* amount of gold present in a watch).

[25] *See, e.g., Certain Fresh Cut Flowers from Peru,* 52 Fed. Reg. 7000 (1987) (0.47% *ad valorem* weighted-average dumping margin held *de minimis*); *Certain Fresh Cut Flowers from Ecuador,* 52 Fed. Reg. 2128 (1987) (0.46% *ad valorem* weighted-average dumping margin held *de minimis*); *Certain Welded Carbon Steel Pipe & Tube Products from Turkey,* 51 Fed. Reg. 13,044 (1986) (0.46% *ad valorem* weighted-average dumping margin held *de minimis*); *Acrylic Film, Strips & Sheets, at Least 0.030 Inch in Thickness from Taiwan,* 49 Fed. Reg. 10,968 (1984) (0.42% *ad valorem* weighted-average dumping margin held *de minimis*); *Certain Steel Pipes & Tubes from Japan,* 48 Fed. Reg. 1206 (1983) (weighted-average dumping margins of 0.27 and 0.02% *ad valorem* held *de minimis*); *Certain Iron Metal Castings from India,* 46 Fed. Reg. 39,869 (1981) (0.40% *ad valorem* weighted-average dumping margin after taking into account currency fluctuations held *de minimis*).

[26] *Carlisle Tire & Rubber Co.* v. *United States,* 634 F. Supp. 419, 423–24 (Ct. Int'l Trade 1986).

[27] *Id.*

margin *and* that the record contains substantial evidence supporting the ITA's basis for its application of the *de minimis* rule.

WRRC argues that, assuming the *de minimis* rule may be applied, the ITA failed to follow the Court of International Trade's requirement, set forth in *Carlisle,* that the ITA explain with substantial evidence on the record why a 0.42 percent dumping margin is *de minimis* in this case. Rather, WRRC contends, the ITA seriously mischaracterized the administrative record and simply applied a bright line rule that dumping margins below 0.50 percent are *de minimis.* We disagree.

Here, in the second remand proceeding, the ITA stated that its "unbroken practice [is] to consider margins below 0.5% to be *de minimis*"; however, the ITA went on to cite several facts drawn from the record to support its conclusion that the 0.42 percent weighted-average dumping margin found for Abbotsford was *de minimis.* First, the ITA relied on findings made by the United States International Trade Commission (ITC) that the prices of the red raspberries are essentially a function of supply and, therefore, the raspberry growers have little or no ability to set their prices. Second, the ITA considered the fact that only a small percentage of Abbotsford's sales were at less than fair value.[28] Third, the ITA stated that Abbotsford's 0.42 percent dumping margin only had resulted in a truly negligible price advantage.[29]

We are of the opinion that the ITA did not seriously mischaracterize the record, as WRRC argues on appeal.[30] Rather, we conclude that there is substantial evidence supporting the conclusion of the ITA that Abbotsford should be excluded from the antidumping duty order.

2. Conversion of Foreign Currencies.

In its final determination, for the purpose of comparing the foreign market value with the United States price, the ITA converted the foreign market value into United States dollars by using the exchange rate in effect at the time of the sale of red raspberries in the United States, not at the time of exportation of the raspberries from Canada to the United States.[31] The ITA reasoned that currency conversion at the time of the United States sale "appears to be more consistent with section 615 of the Trade and Tariff Act of 1984 [19 U.S.C. § 1677b (Supp. III 1985)]."[32] The Court of International Trade upheld the ITA's reliance on section 615, concluding that such reli-

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[28] The ITC determined that only 17% of Abbotsford's sales compared were at less than fair value, with dumping margins ranging from 0.9% to 4.2%. The ITC investigated the 1983-84 crop year, the period from July 1, 1983, to June 30, 1984.

[29] The ITA found that a 0.42% margin would correspond to a price advantage of approximately two-tenths of a cent per pound on those few sales of raspberries at prices below fair market value.

[30] WRRC also argues that the ITA's recently promulgated rule establishing 0.5% dumping margins as *de minimis* (19 C.F.R. § 353.24 (1987)) is unreasonable and does not validate the decision in this case. We do not reach this issue, because the rule did not become effective until 8 days after the decision of the trial court. Further, neither the ITA nor the Court of International Trade based its decision on the rule.

[31] The ITA based foreign market value on either constructed value or the prices paid for raspberries sold in Canada at the time of United States sales to unrelated purchasers, in accordance with § 773(a)(1) of the Tariff Act of 1930, 19 U.S.C. § 1677b(a)(1), as amended by § 615 of the Trade and Tariff Act of 1984, Pub. L. No. 98-573 (Oct. 30, 1984).

[32] Red Raspberries from Canada: Final Determination of Sales at Less Than Fair Value, 50 Fed. Reg. at 19,771.

ance was an appropriate exercise of the ITA's authority to determine foreign market value.[33]

WRRC, citing 19 C.F.R. § 353.56(a),[34] argues that, where an exporter's sale price is used to establish the United States price, the foreign market value of the product is to be computed as of the date of exportation. On this basis, WRRC contends that the Court of International Trade erred by sustaining the ITA's calculations. This argument is not persuasive.

The Court of International Trade, in addressing this issue, concluded that[35]

> it would now be anomalous for the time of the first sale of imported merchandise within the United States to an unrelated purchaser to be the point of reference for foreign market value in accordance with [19 U.S.C. § 1677b], while converting the foreign currency involved "as of the date of exportation" within the meaning of [19 C.F.R. § 353.56(a)] [footnote omitted] which may have been months or even calendar quarters earlier.

We are in complete agreement with the Court of International Trade. Both the United States price and the foreign market value are subject to cost adjustments in an attempt to derive values at a common point in the chain of commerce, so that the values reasonably can be compared on an equivalent basis.[36] That is precisely what the ITA did in this case. The antidumping statute was amended in 1984, requiring comparison of foreign market value with exporter's sales price on the date of sale of the imported merchandise in the United States, and the ITA, in this case, was acting in accordance with the law by converting the foreign currency involved as of the date of the United States sale.

3. Pails and Drums.

The ITA, in calculating the constructed value of the red raspberries for the packers, "excluded Canadian packing costs because these costs [were] not part of the cost of the merchandise sold to the United States." Instead, the ITA, determining that these costs were "incidental" to the cost of the red raspberries, added the cost in accordance with 19 U.S.C. § 1677b(e)(1)(C). The Court of International Trade reversed, concluding that "when the merchandise is delicate fruit inherently incapable of commercial survival, standing alone, and its intended movement in trade is in its natural form, then the cost of primary containers used is not 'incidental' within the meaning of subparagraph (C) of 19 U.S.C. § 1677b(e)(1)." Rather, the Court of International Trade determined, the pails and drums containing the raspberries were primary containers and an integral part of the merchandise. On that basis, the Court of International

[33] *WRRC I*, 657 F. Supp. at 545.
[34] Section 353.56(a) provides the general rule for conversion of currencies that is to be used in determining the difference between the United States price and the foreign market value.
[35] *WRRC I*, 657 F. Supp. at 545.
[36] *Smith-Corona Group*, 713 F.2d at 1571–72.

Trade concluded that the pails and drums were "materials" within the meaning of section 1677b(e)(1)(A). We agree.

"Materials," pursuant to subsection (A), include those materials required to "permit the production of that particular merchandise in the ordinary course of business." Here, the merchandise in question are red raspberries in their natural form. The red raspberries could not exist in their natural form but-for the pails and drums. As recognized by the Court of International Trade, without these primary containers, the raspberries would become "raspberry juice, or compote, at least." Accordingly, because without the pails and drums the raspberries could not exist in their natural form, the costs of the pails and drums must be included under subsection (A).

The Government, apparently equating drums and pails with "packing costs," cites numerous ITA decisions as supporting its argument that the ITA consistently has treated "packing costs" as costs of containers and coverings under subsection (C) rather than as materials under subsection (A). On this basis, the Government would have us reverse the Court of International Trade's decision on this issue. We are not persuaded.

We cannot hold, as the Government would have us, that any time a product is held in a container, the cost of that container must be characterized either as a packing cost or as an expense incidental to placing that product into commerce and included under subsection (C). Rather, when a product cannot exist in its natural form but-for the container, that container's cost may be included under subsection (A).

CONCLUSION

In view of the foregoing, we hold that the Court of International Trade correctly sustained the ITA's application of the *de minimus* rule in this case. In addition, we conclude that the Court of International Trade properly sustained the ITA's calculation of the foreign market value. Finally, we hold that the Courts of International Trade did not err by characterizing the pails and drums as materials and including their cost under subsection (A).

AFFIRMED

(Appeal No. 88–1217)

BANTAM TRAVELWARE DIV. OF PETER'S BAG CORP., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

Judith M. Barzilay, Siegel, Mandell & Davidson, P.C., of New York, New York, argued for plaintiff-appellant. With her on the brief was *Brian S. Goldstein.*

James A. Curley, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *John R. Bolton,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph T. Liebman,* Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade.
Judge TSOUCALAS.

Before MAYER, *Circuit Judge,* NICHOLS, *Senior Circuit Judge,* and MICHEL, *Circuit Judge.*

PER CURIAM.
The judgment of the United States Court of International Trade, 679 F. Supp. 8 (1987), is affirmed on the basis of the court's opinion, which we adopt.

AFFIRMED

(Appeal No. 88–1234)

UNITED STATES, PLAINTIFF-APPELLANT *v.* FEDERAL INSURANCE CO. AND COMETALS, INC., DEFENDANTS-APPELLEES

Barbara M. Epstein, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for plaintiff-appellant. With her on the brief were *John R. Bolton,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office.
David Serko, Serko, Simon & Abbey, of New York, New York, argued for defendants-appellees.

Appealed from: U.S. Court of International Trade.
Judge WATSON.

(Decided September 30, 1988)

Before MARKEY, *Chief Judge,* SMITH and NIES, *Circuit Judges.*

SMITH, *Circuit Judge.*
In this international trade case, the United States Court of International Trade entered a "Judgment in Conformity with Mandate,"[1] awarding the United States (Government) both unpaid import duties in the amount of $230,344.12 and postjudgment interest on that amount. The court below denied prejudgment interest and the Government appeals that denial. We reverse the denial of prejudgment interest. Consequently, we vacate the amount of interest awarded and remand for recalculation.

[1] *United States* v. *Federal Ins. Co.,* Court No. 82-05-00594 (Ct. Int'l Trade Dec. 8, 1987).

ISSUE

The principal issue on appeal is whether the Court of International Trade erred by holding that Federal Rule of Appellate Procedure 37 precluded it from attaching prejudgment interest, pursuant to 19 U.S.C. § 580, to that court's award of unpaid import duties in compliance with a mandate by this court.

BACKGROUND

Originally, this proceeding was initiated by the United States to recover unpaid liquidated import duties in the amount of $230,344.12 and interest from an importer of titanium sponge, Cometals, Inc., and/or its surety, Federal Insurance Co. (collectively referred to as Federal). The importer and its surety had executed a bond ensuring the payment of the duties. On March 14, 1985, the Court of International Trade entered judgment against the United States, holding that the United States was equitably estopped from collecting the unpaid import duties in question from these parties.[2] The Government appealed that decision to this court.

On appeal, this court reversed the judgment of the Court of International Trade and remanded the case to that court "for entry of judgment on liability in favor of the [G]overnment and such further proceedings as [were] consistent with [that] opinion."[3] Federal's petition for rehearing was subsequently denied and, on December 15, 1986, this court's mandate (prior mandate) issued in accordance with Federal Rule of Appellate Procedure 41.

On remand, the Court of International Trade, in its Judgment in Conformity with Mandate, entered judgment for unpaid import duties upon a bond to the Government in an amount of $230,344.12. In addition, that court awarded to the United States postjudgment interest on that amount in accordance with 28 U.S.C. § 1961(c)[4] at the annual rate established under section 6621 of the Internal Revenue Code of 1954.[5] However, the Court of International Trade denied the United States' request for prejudgment interest. On that issue, the Court of International Trade, citing both Federal Rule of Appellate Procedure 37 and *Briggs* v. *Pennsylvania Railroad Co.*,[6] held that it was powerless in this case to add interest for a period prior to the mandated judgment when the mandate of the appellate court did not expressly contain instructions with respect to allowance of interest. For the reasons set forth below, we hold that the Court of International Trade erred, as a matter of law, in reaching this conclusion.

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[2] *United States* v. *Federal Ins. Co.*, 605 F. Supp. 296 (Ct. Int'l Trade 1985).
[3] *United States* v. *Federal Ins. Co.*, 805 F.2d 1012, 1020 (Fed. Cir. 1986), *cert. denied*, 107 S. Ct. 2179 (1987).
[4] 28 U.S.C. § 1961(c) (1982).
[5] 26 U.S.C. § 6621 (1982).
[6] *Briggs* v. *Pennsylvania R.R.*, 334 U.S. 304 (1948).

ANALYSIS

Rule 37 of the Federal Rules of Appellate Procedure provides the general rule for the payment of interest on a trial court's judgment for money that has been reviewed by an appellate court.

> **Rule 37. *Interest on Judgments***
>
> *Unless otherwise provided by law,* if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest. [Emphasis supplied.]

Although Rule 37 provides the general rule for an award of interest on judgments, Rule 37 does recognize that exceptions to the general rule may be "otherwise provided by law." When such an exception is provided by law, the rule set forth by that exception must be applied.

One such exception is provided by 19 U.S.C. § 580 for suits on bonds to recover unpaid import duties.

> **§ 580. Interest in suits on bonds for recovery of duties**
>
> Upon all bonds, on which suits brought for the recovery of duties, interest shall be allowed, at the rate of 6 per centum a year, from the time when said bonds became due.

Thus section 580 expressly requires that, when unpaid import duties upon a bond are awarded, interest be attached at the statutory rate "from the time when said bonds became due." As a matter of law, whenever a court awards unpaid import duties in a suit upon a bond, interest must be attached pursuant to section 580.

The present action is a suit upon a bond by the United States for the recovery of unpaid import duties. Such is precisely the type of action contemplated by section 580. This court's prior mandate ordered "entry of judgment on liability in favor of the [G]overnment" on the United States' action to recover unpaid import duties. Accordingly, to comply with that mandate, the Court of International Trade must award to the United States interest at the statutory rate set forth in section 580 on the unpaid import duties from the time when the bonds became due.

Federal quotes the following language of Rule 37 as preventing an award of prejudgment interest in this case: "[i]f a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest." On the basis of this language, Federal reasons that, because this court's prior mandate made no provision for prejudgment interest, the Court of International Trade, on remand, was precluded from awarding such interest. Fed-

eral cites the United States Supreme Court's decisions in *Briggs*[7] and in *The Santa Maria*[8] as compelling such a conclusion. We disagree.

As previously discussed, Rule 37 provides the general rule for the payment of interest on a judgment for money. However, Rule 37 must be followed only if no specific provisions are "otherwise provided by law." Here, because this proceeding is an action upon a bond by the United States to recover unpaid import duties, section 580 provides an exception to the general rule. Thus, the interest provision of section 580 applies in this case and the general rule set forth by Rule 37 does not preclude recovery under that section. The results reached by the Supreme Court in *Briggs* and *The Santa Maria* are clearly distinguishable from the present case. In those cases, an award of prejudgment interest was not expressly required by statute, whereas, here, section 580 requires that, when unpaid import duties are awarded, interest must be attached at the statutory rate "from the time when said bonds became due."

Federal contends that the limiting phrase of Rule 37, "[u]nless otherwise provided by law," only modifies the first sentence of Rule 37, which sentence relates to a judgment for money in a civil case that is affirmed. Federal contends that the limiting phrase does not modify the second sentence of Rule 37 relating to when a judgment is modified or reversed. As support for this contention, Federal cites both the grammatical context of Rule 37 and the "Notes of Advisory Committee on Appellate Rules" accompanying Rule 37. We are not persuaded. The plain language of Rule 37 makes clear that the limiting phrase applies to Rule 37 as a whole and is not applicable only to the first sentence. The Advisory Committee Notes provide no support for Federal's contention.

Finally, Federal argues that the Government's appeal is in fact an untimely motion to this court seeking a recall and reformation of this court's prior mandate. Federal contends that the Government, under the guise of this appeal, simply is attempting to rectify this court's "failure to award interest" in the prior mandate. The Government, Federal asserts, has failed to avail itself of the proper mechanism for obtaining recall of the prior mandate, and therefore should be barred from asserting any further claim to prejudgment interest. This argument is meritless.

As previously discussed, Rule 37 does not preclude the attachment of statutory prejudgment interest, pursuant to section 580, in a suit on a bond for the recovery of import duties. Rather, as a matter of law, to comply with this court's prior mandate, the Court of International Trade must award interest to the United States, pursuant to section 580, at the statutory rate "from the time when said bonds became due." Our disposition of this issue does not require us to recall or to reform our prior mandate.

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[7] *Briggs*, 334 U.S. 304.
[8] *The Santa Maria*, 23 U.S. (10 Wheat.) 431 (1825).

CONCLUSION

In view of the foregoing, we affirm that portion of the Court of International Trade's Judgment in Comformity with Mandate awarding the United States unpaid import duties in the amount of $230,344.12.[9] However, we hold that the lower court erred, as a matter of law, in calculating the award of interest to the United States on that amount. Accordingly, we vacate the judgment of the Court of International Trade denying, pursuant to Rule 37, prejudgment interest to the United States and granting, pursuant to 28 U.S.C. § 1961(c), postjudgment interest to the United States. We remand this proceeding to that court for further proceedings in accordance with this opinion.

COSTS

Costs on appeal are awarded to the United States.

REVERSED; VACATED IN PART; AND REMANDED

(Appeal No. 88–1258)

NEC AMERICA, INC., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

Edward N. Glad, Glad & Ferguson, of Los Angeles, California, argued for plaintiff-appellant.

Saul Davis, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for appellee. With him on the brief were *John R. Bolton,* Assistant Attorney General, *David M. Cohen,* Director and *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office.

Appealed from: U.S. Court of International Trade.

Chief Judge RE.

(Decided: September 28, 1988)

Before ARCHER, *Circuit Judge,* BALDWIN, *Senior Circuit Judge,* and MAYER, *Circuit Judge.*

ARCHER, *Circuit Judge.*

This appeal is from the judgment of the United States Court of International Trade classifying certain "paging receivers" under item 685.24 of the Tariff Schedules of the United States.

The same merchandise presented in this case was the subject of classification in *NEC America, Inc.* v. *United States,* 8 CIT 184, 596 F. Supp 466 (1984), *aff'd,* 760 F.2d 1295 (Fed. Cir. 1985) *(NEC I).*

[9] The parties do not challenge this portion of the lower court's judgment.

Chief Judge Re again reached the same conclusion we previously affirmed in *NEC I*.

We have considered the arguments of the appellant but, for the reasons expressed in the opinion below, we conclude that the holding of *NEC I* was not erroneous. Accordingly, we affirm the judgment in this case.

AFFIRMED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

ANNOUNCEMENT

Chief Judge Edward D. Re has announced the call of the Fifth Annual Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Friday, November 18, 1988 in The Ballroom at Windows on the World, 106th Floor, One World Trade Center, New York, New York and will commence at 9:00 a.m.

The theme of the Conference is: "The Administration of Justice—the Responsibility of Bench and Bar: Evaluating the Fairness, Efficiency and Cost-Effectiveness of Litigation."

The Honorable Peter W. Rodino, Jr., Chairman, Committee on the Judiciary, United States House of Representatives, will present Chief Judge Re with the Court's Distinguished Service Award for his outstanding contributions to the administration of justice in the field of international trade law.

The Honorable Howard T. Markey, Chief Judge, United States Court of Appeals for the Federal Circuit, will be a special guest.

The Conference will be attended by the Judges of the United States Court of International Trade, officials from the International Trade Commission, the Customs Service, the Departments of Justice, Commerce, and Treasury; members of the Bar of the Court; and other distinguished guests.

More than 400 lawyers, the largest single gathering in the United States of attorneys interested in the field of customs and international trade law, have participated in each of the past four Annual Judicial Conferences.

Lawyers and other interested persons are invited to attend. Since capacity is limited, early return of your registration form is suggested. To facilitate final arrangements, it would be appreciated if your registration form is received on or before Friday, November 4, 1988.

For further information, please write to:

USCIT Judicial Conference
c/o Office of the Clerk
United States Court of International Trade
One Federal Plaza
New York, New York 10007

Dated: October 7, 1988.

JOSEPH E. LOMBARDI,
Clerk of the Court.

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